IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 195

NORTHWESTERN ELECTRIC COMPANY

AND

AMERICAN POWER & LIGHT COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No. _____

NORTHWESTERN ELECTRIC COMPANY

and

AMERICAN POWER & LIGHT COMPANY,

Petitioners,

v.

FEDERAL POWER COMMISSION,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the decree of the Circuit Court of Appeals for the Ninth Circuit entered March 27, 1943, affirming an order of the Federal Power Commission dated April 14, 1942.

Basis of Jurisdiction

Jurisdiction is invoked under Section 313 (b) of the Federal Power Act, 49 Stat. 860, 16 U. S. C. A. § 825, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. § 347 (a). The opinion of the Circuit Court of Appeals for the Ninth Circuit was filed March 27, 1943 (R. Vol.

VI, p. 1230), and is reported in 134 F. (2d) 740. Petition for rehearing was denied May 22, 1943. An order staying the mandate to and including July 24, 1943, pending application for writ of certiorari, was entered May 22, 1943 (R. 1244).

Statute Involved

The statute involved is the Federal Power Act of 1935 (hereinafter referred to as the "Act"), 49 Stat. 847, 16 U. S. C. A. § 791a, *et seq.*, particularly Section 301(a) of the Act, 49 Stat. 854, 16 U. S. C. A. § 825 (a), which authorizes the Federal Power Commission (hereinafter referred to as the "Commission") to prescribe a system of accounts for public utilities subject to the Act. Certain sections of the Act which have an important bearing are set forth in Appendix A.

Summary Statement

(a) The Act

The Act of 1935 added to the Federal Water Power Act of 1920 (relating to licensed water-power projects) provision for limited federal regulation of electric public utilities engaged in interstate commerce. It declares, as a basis for the exercise of federal jurisdiction over public utilities, that the business of generating and transmitting electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is affected with a public interest, and that federal regulation thereof is necessary in the public interest, "such federal regulation, however, to extend only to those matters which are not subject to regulation by the states." It provides that the Commission shall have a limited jurisdiction over facilities for such transmission or sale of electric energy, but shall not have jurisdiction over fa-

cilities used for generation in local distribution or only for the transmission of electric energy in intrastate commerce (Section 201).

Section 301 (a) of the Act requires every public utility to make and keep such accounts and other records as the Commission may "prescribe as necessary or appropriate for purposes of the administration of this Act" and authorizes the Commission to prescribe a system of accounts to be kept by licensees and public utilities and to determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited, subject to the proviso: "That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State."

(b) Nature of Proceeding and of the Issues

Northwestern Electric Company (hereinafter referred to as "Northwestern") is a public utility, as defined in the Act, doing business in Washington and Oregon. It is a subsidiary of American Power & Light Company (hereinafter referred to as "American"), a registered holding company, and thus it also is subject to the jurisdiction of the Securities and Exchange Commission under the Public Utility Holding Company Act of 1935, 49 Stat. 803, *et seq.*, 15 U. S. C. A. § 79. Its property comprises both electric and steam heating facilities. All of its steam heating facilities (which are not in any way subject to the Commission's jurisdiction) and the major portion of its electric facilities are devoted solely to intrastate uses. Northwestern's activities and operations are subject to comprehensive regulation by the authorities of Washington and Oregon as to rates, adequacy of service, issuance of securities, accounting, contracts with affiliated interests, and every other aspect of its business which concerns the general public.

Northwestern was incorporated in 1911 in the State of Washington, the organizers remaining, in effect, the sole owners of the enterprise until 1915. In 1911 and 1912, the corporation issued to the organizers 100,000 shares of its $100 par value common stock. The organizers subsequently returned approximately 45,000 of these shares to the Company, in effect as treasury stock, and they were reissued to purchasers of new securities as an inducement and part consideration for such purchases (R. 15-16, 256-258).

American first acquired an interest in Northwestern in 1925, when it purchased the common stock of Northwestern (98% in February and March, 1925, and the remainder from time to time thereafter) at a cost of more than $5,000,000. These acquisitions were made from the public, at arm's length, for value, and without knowledge of any facts indicating that the stock was not fully paid. At the time (from January through March, 1925), the market price of said common stock on the San Francisco Stock Exchange ranged from $32\frac{1}{2}$ to $47\frac{7}{8}$ dollars per share (R. 926-7, 968, Ex. 87, 88). The Commission refused to admit evidence showing that, at the time of American's acquisition of such stock and at the time of the hearing, the value of the assets of Northwestern, as shown by its earning power, low rates to the public, and other criteria of value, fully supported its security structure (R. 916-924, 850-869, Ex. 79-81).

In 1935, certain preferred stockholders of Northwestern brought an action in the state courts of Washington, on behalf of themselves and other stockholders and on behalf of Northwestern, contending that the common stock was issued without consideration and praying that it be cancelled or that the then holder, American, be required to pay its full par value to Northwestern. A final decree quieting American's title to such stock as fully paid and non-assessable was entered pursuant to a stipulation of the parties which required the reduction of the par value of Northwestern's common stock from $100 per share to $35 per share, or, in the aggregate, from $10,000,000 to $3,500,000

(R. 970-1001, 1044-1051, Ex. 89). Concurrently, Northwestern made application to the regulatory authorities of the States of Oregon and Washington for approval of the reduction of the stated value of its common stock to $3,500,000 upon the basis of a determination by the Board of Directors of Northwestern of the then fair value of its assets. The reissue of 100,000 shares of fully-paid and non-assessable common stock of said par value of $35 per share was authorized and approved by such state regulatory authorities and the stock was so reissued (R. 575-587, 869-895, 1053-1054, Exs. 63, 64, 82-84).

In 1936, the Commission, acting under Section 301(a) of the Act, prescribed a system of accounts for licensees and public utility companies. In 1940, following a hearing (to which American was not a party) with respect to the reclassification of Northwestern's accounts, the Commission entered its opinion holding that Northwestern's common stock was not represented by any assets received by that Company. The Commission ordered Northwestern to *reclassify* its accounts by making various adjustments, including the transfer of $3,500,000 from its plant account to Account 107, Electric Plant Adjustments. The Commission, apparently considering that a write-off of that amount must follow as a matter of course, further ordered that Northwestern *dispose* of said amount of $3,500,000 by annual charges to surplus equal to its net income after allowance for preferred stock dividend requirements.* Upon review in the Circuit Court of Appeals for the Ninth Circuit, that court affirmed the ordered reclassification of accounts (*Northwestern Electric Co.* v. *Federal Power Commission*, 125 F. (2d) 882), but did not pass upon the question, whether Northwestern could be required to dispose of said amount of $3,500,000, because the Commission had granted a rehearing as to that question upon the petition and protest of Northwestern that the *issue of disposition* was not within the scope of the

* The Commission's opinion stated: "This disposition, assuming adequate earnings, is the equivalent of obtaining ultimately from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock." (R. 69.)

Commission's original order to show cause. After a hearing on the issue of *disposition*, at which time American intervened and became a party, the Commission adhered to its original order (R. 58-62, 78, 1172-1173) and, upon review of the Commission's then definitive order of disposition, the opinion of the court below was entered.

Questions Presented

The questions presented are:

(1) Whether the Commission, by virtue of its statutory authority to prescribe a system of accounts, is authorized not merely to require the maintenance of a separate set of accounts for its own information, but also to require both (a) that the general corporate and fundamental books of account of a public utility company be recast to conform to the Commission's system of accounts and (b) that all internal affairs of the company, including the company's right to pay dividends, as well as contract and other rights between the company and its stockholders or between its stockholders, the determination of which is beyond the scope of the accounting function, be governed by that system of accounts or altered to conform thereto, particularly where any such requirement would alter those rights as they (i) are determinable under state law or (ii) have been specifically adjudicated by a state court of competent jurisdiction.

(2) Whether the Commission may direct the writing-off, as distinguished from the mere segregation, of book values in excess of original cost, without consideration of actual and existing values in Northwestern's assets fully sufficient to support its book values, particularly (i) where the present owner is an innocent purchaser for value who acquired the stock on the basis of then present values in separate arm's-length transactions with numerous sellers unrelated to and unaffiliated with such purchaser, and where, under the law of the state of incorporation such stock must be considered as fully paid, (ii) where the

method of write-off ordered is substantially equivalent to a judgment against the present owner of Northwestern's common stock upon the unpaid stock subscription of a predecessor owner of the stock, although the rights of the present owner in the stock have already been settled by the judgment of a state court of competent jurisdiction, (iii) where the method of write-off ordered is, in effect, a corporate reorganization of Northwestern, and (iv) where the Commission's allowance of preferred stock dividend payments tacitly recognizes that the capital structure is not impaired.

(3) Whether the method of write-off ordered by the Commission is invalid and the exercise of an unconstitutional power (i) in that it is unsupported by substantial evidence and is arbitrary and capricious, in requiring the write-off to be made entirely out of future earnings and in preventing the application of any part of the existing surplus of Northwestern to such write-off, and (ii) in that it involves an unlawful assumption by the Commission of jurisdiction over the payment of dividends by Northwestern and over a corporate reorganization of Northwestern.

(4) Whether Section 301(a) of the Act, if it be construed to authorize the action taken by the Commission, is unconstitutional and void in that it violates the due process clause of Article V of the Amendments to the Constitution of the United States, contravenes Articles IX and X of the Amendments to the Constitution of the United States, and confers judicial powers upon the Commission in violation of Article III of said Constitution.

(5) Whether the Circuit Court of Appeals deprived these petitioners of their right to judicial review, provided for by Section 313(b) of the Federal Power Act, and guaranteed by the due process clause of Article V of the Amendments to the Constitution of the United States:

(i) By refusing to consider whether the Commission was authorized to order a write-off of $3,500,000

of book values in excess of original cost without consideration of proof of existing values offered by petitioners upon a rehearing before the Commission while the first appeal was still pending, on the ground that this question had been decided on the first review, despite the fact that on the first review the court held that the issue was not then before it.*

(ii) By refusing to consider whether the Commission had arrogated judicial powers by determining, in effect, that the common stock of Northwestern was not legally paid up, a question properly determinable only by the courts and law of Washington. The court based such refusal solely on the mistaken premise that petitioners had not contended that the statute was void, when in fact petitioners have argued consistently that the statute must be construed to deny judicial power to the Commission if its constitutionality is to be sustained.

Reasons Relied on for Allowance of the Writ

I.

The Circuit Court of Appeals has decided important questions of federal law which have not been, but should be, settled by this court.

(a) The Commission's disposition order does not merely require that a memorandum set of accounts reflecting original cost be kept for the information of the Commission according to its own classification. On the contrary, it purports to direct the entries which are to be made on the general books of account of Northwestern and by virtue of such forced entries purports to control and direct corporate action, such as the payment of div-

* The opinion of the Circuit Court on the prior review (R. 806, 819) states: "With respect to the common-stock item, a rehearing of the Commission's order was granted but not decided. Until decided there is no 'order' to review here.

idends and the determination of the rights of stockholders. The entries having been ordered under the guise of accounting regulation, such entries are seized upon as an excuse for the usurpation of the judicial power to deprive petitioners of property and property rights without due process of law. The Commission thus interprets Section 301(a) of the Federal Power Act to authorize it (1) to disregard existing values in an accounting enterprise and all rights determinable under the laws of the several states, (2) to adjudicate or readjudicate rights between a company and its security holders or between different classes of security holders, (3) effectively to annul the lawful and appropriate corporate reorganization which was effected by Northwestern in 1936 and the previous determination by a state court of competent jurisdiction of the validity of Northwestern's common stock and the rights vested in the holder thereof as against Northwestern and other security holders, and (4) seriously to impair or largely to destroy the rights vested under state law upon acquisition of such common stock by an innocent purchaser for value (*Davies* v. *Ball*, 64 Wash. 292). Congress could not have intended that the Commission should thus usurp such judicial powers and, in their exercise, confiscate property and property rights.

This case therefore presents one aspect of a question of great importance in public utility regulation, *i. e.*, whether the Commission, by reason of its limited jurisdiction over mere accounting, may exercise plenary and exclusive power over all internal affairs of a public utility company subject to state regulation, and over all rights of its security holders, through ordering adjustments in the previously established fundamental accounts of the company and directing or controlling the use of its net income. The question is of extreme importance to every company subject to the jurisdiction of the Commission and to the security holders of every such company. If the Commission's position is correct, every transaction reflected in the accounts of such companies is made subject to cancellation or adjustment without regard to rights ac-

quired and vested under the laws of the several states and the guarantees of the Constitution of the United States. If the Commission's interpretation of the statute is correct, Section 301(a) of the Act is unconstitutional and void.

(b) The case presents the further question of whether the Commission's accounting concept, as given expression in an order which prevents the payment of dividends on Northwestern's common stock for what may be an indefinite period, constitutes the exercise of a power to compel the reorganization of a public utility company or restrict or control the payment of dividends by it despite the provisions of Sections 11 and 12(c) of the Public Utility Holding Company Act of 1935, 49 Stat. 820 and 823(c), 15 U. S. C. A. §§ 79k and 79l(c), which confer upon the Securities and Exchange Commission powers with respect to the reorganization of, and payment of dividends by, public utility subsidiaries of registered holding companies, and the provision of Section 318 of the Federal Power Act, 49 Stat. 863, 16 U. S. C. A. § 825q, that a person shall not be subject to the requirements of the Federal Power Act or of any rule, regulation, or order thereunder, if such person is subject to a requirement with respect to the same subject matter under the Public Utility Holding Company Act of 1935, unless exempted therefrom by the Securities and Exchange Commission. The latter Commission has not exempted Northwestern from *any* requirement of the Public Utility Holding Company Act.

II.

The Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court.

(a) Since at least a quasi-reorganization of the capital structure of Northwestern is effected by the Commission's order, the decision of the court below, in affirming the Com-

mission's disregard of both the earning power of Northwestern's property and other necessary and universally applied criteria of value of the assets supporting its security structure, is in conflict with the decision of this Court in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510.

(b) The Circuit Court of Appeals treated the write-off as an inevitable consequence of reclassification of the amount of $3,500,000 in Account 107. It therefore decided that its ruling as to the validity of the Commission's system of accounts also determined the validity of the write-off directed by the Commission's order which was the subject of the second review now before this Court, thus precluding any judicial review of a write-off the impropriety and invalidity of which were made obvious by the evidence of value sufficient to support Northwestern's capital structure offered by the petitioners and in the record on such second review. This holding ignored the clear distinction between mere segregation of book values in excess of original cost and the actual writing off of such segregated values which was drawn by this Court in *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232.

III.

The Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The court below, misfaking the issues and the scope and effect of its first decision, denied these petitioners judicial review and their day in court by refusing to consider, on the first review, the question of whether the Commission could order the write-off of $3,500,000 here under scrutiny without considering values patently existing in the property of Northwestern and by regarding that ques-

tion as previously decided when it was raised upon the second review on a record devoid of any evidence establishing that the capital structure of Northwestern was impaired, but containing an improperly rejected offer to prove the contrary. The court below also denied the petitioners their day in court and judicial review by refusing to consider whether the statute must be construed to deny the Commission the right to arrogate judicial powers in order to sustain the constitutionality of such statute, the ground of such refusal having been that the petitioners had not contended that the statute was void, although the unconstitutionality of any construction of the statute which purported to confer such judicial powers was strongly urged.

For the reasons herein set forth, it is respectfully submitted that this petition should be granted.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. Vol. VI, p. 1230) is reported in 134 F. (2d) 740. The opinion of the Commission and its order are printed in Vol. V of the record at pp. 1164-1172.

The opinion of the Circuit Court of Appeals for the Ninth Circuit upon the first review, which is drawn in question here by the holding of the court that its first opinion disposed of certain issues raised upon the second review (R. Vol. IV, p. 806), is reported in 125 F. (2d) 882.

Basis of Jurisdiction

Jurisdiction is invoked under Section 313(b) of the Federal Power Act, 49 Stat. 860, 16 U. S. C. A. § 825, and Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A. § 347(a). The opinion of the Circuit Court of Appeals was filed March 27, 1943, and is reported in 134 F. (2d) 740. Petition for rehearing was denied May 22, 1943 (R. 1243). An order staying the mandate to and including July 24, 1943, pending application for writ of certiorari, was entered May 22, 1943 (R. 1244).

Statute Involved

The statute involved is the Federal Power Act of 1935 (hereinafter referred to as the "Act"), 49 Stat. 847, 16 U. S. C. A. § 791a, *et seq.*, particularly Section 301(a) of the Act, 49 Stat. 854, 16 U. S. C. A. § 825(a), which authorizes the Federal Power Commission to prescribe a system of accounts for public utilities subject to the Act. Certain sections of the Act which have an important bearing are set forth in Appendix A.

Statement of the Case

A statement of the case pertinent to the reasons relied upon for the granting of the writ is contained in the petition herein (*supra*, pp. 2 to 6).

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Ninth Circuit erred:

1. In holding that the Commission was authorized to enter such an order of disposition regardless of the effects thereof upon the general and fundamental books of account and corporate affairs of a public utility company and upon rights determinable under state law;

2. In holding that the ordered disposition could be required regardless of the existing values in Northwestern's assets sufficient to support its book values and security structure, particularly (a) where the order is substantially equivalent to a judgment against the present owner of Northwestern's common stock upon an unpaid stock subscription of a predecessor owner—a judicial question to be determined by the courts and law of the State of Washington, (b) where the rights of the present owner in the stock as settled by Northwestern's reorganization in 1936 and by the judgment of a state court of competent jurisdiction, and the status of the stock as fully-paid, are determinable only by the law of the State of Washington, and (c) where the method of write-off ordered is, in effect, a corporate reorganization of Northwestern;

3. In holding that petitioners' contentions that the order is arbitrary, because it ignores Northwestern's large existing surplus and values present in Northwestern's properties, are not pertinent because they have no bearing on the "original cost" theory of the system of accounts;

4. In failing to pass upon the conflict in jurisdiction between the Commission and the Securities and Exchange Commission and in failing to hold that the write-off ordered by the Commission involves an unlawful assumption by the Commission of jurisdiction over the payment of dividends by Northwestern and over a corporate reorganization of Northwestern;

5. In holding that it would not consider petitioners' arguments that the Commission's disposition order had ignored actual values presently existing in Northwestern's business because the court had approved the system of accounts on the first review;

6. In holding that the authority of the Commission to enter such an order of disposition could not be denied except by a challenge that the statute is void, and in failing to consider whether, to avoid a holding that the statute is unconstitutional, it must be so construed as to withhold such authority.

I

The Commission was without authority of law to enter such an order of disposition in complete disregard both of the effects thereof upon the general and fundamental books of account and corporate affairs of a public utility company and of the fact that disposition of income is not a function of accounting. The Commission has clearly gone beyond the ambit of its statutory and constitutional authority in its attempt to destroy substantive rights through the dogmatic application of its accounting concepts.

The opinion of the court below holds, as to petitioners' contention that the effect of the Commission's order is an adjudication that the common stock is not legally paid up, that the statute authorized the Commission "to do what it did, regardless of whether the effects mentioned by petitioner result." In substance, this is a holding that the

Commission is authorized to assume exclusive jurisdiction of, and to oust judicial and other state authority over, internal affairs of a public utility company upon which the accounting requirements of the Commission or any order assumed to be related thereto may impinge.

Upon the first review, which was concerned only with questions of reclassification, the opinion of the court below said (R. 816-817):

> "The system of accounts takes nothing from petitioner. Petitioner may keep such other accounts as it desires. The present regulation only requires a particular system of accounts to be kept, not that other systems shall not be kept."

The Circuit Court of Appeals for the Second Circuit, in *Northern States Power Company* v. *Federal Power Commission*, 118 Fed. (2d) 141, and the Court of Appeals for the District of Columbia, in *Alabama Power Company* v. *Federal Power Commission*, 128 Fed. (2d) 280, also expressed the opinion that a company could keep more than one set of books. The decision of the court below on the second review, however, runs counter to these holdings and sets up an irreconcilable conflict with them. The purpose of the Commission's order of disposition — to require the contribution to capital of an additional $3,500,000 — would be frustrated, and the order itself would be denied any efficacy unless the holding of the court below is that the order of disposition governs Northwestern's fundamental books of account and financial transactions such as the payment of dividends, to the exclusion of any other plan or system or authority.

But the Commission is not clothed with any such comprehensive, all-inclusive judicial and regulatory power. The Act expressly negatives such intent in language that must be deemed to have been carefully chosen and which was written into the bill after the hearings had disclosed great concern lest the Act interfere unduly with local

regulation and its proponents had clearly stated that its purpose was to supplement state regulation and to fill the gap indicated by *Public Utilities Comm.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83. Section 201(a) of the Act (16 U. S. C. A. § 824a) expressly provides that the Commission's regulatory authority shall "*extend only to those matters which are not subject to regulation by the States.*" The reports of the Senate and House Committees on Interstate Commerce on the bill and the statements of Commissioner Seavey, speaking as a member of the Commission, and Dozier DeVane, General Solicitor for the Commission, in support of this legislation make it evident that the bill was conceived entirely as a supplement to and not as a substitute for state regulation. The report of the Senate Committee contains the following illustrative statement:

> "Section 201—Subsection (a) contains a declaration of the necessity for Federal regulation and defines the scope of that regulation. * * * It also declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission."

The question presented is clearly distinguishable from the issues raised in the applications for certiorari of *Alabama Power Company* and *Louisville Gas and Electric Company* (applications denied, 317 U. S. 652, and 317 U. S. —— [Feb. 8, 1943]), where the applicants were *licensees* under the Federal Power Act, a distinction emphasized in each of these cases. Northwestern is not a licensee of the Commission, has received no sovereign grant and has not, by express contract, consented to the exercise by the Commission of the authority here challenged. Incidentally, the court below did not refer to any of the licensee cases in its opinion, although those

cases had been almost exclusively relied upon in the Commission's brief. The distinction was too obvious, as appears from the following excerpt from the opinion of the Circuit Court of Appeals for the Sixth Circuit in the *Louisville* case (129 F. (2d) 126, 132):

> "* * * Questions of value, for purposes of amortization, recapture, or taking over, are not those which apply for rate-making purposes to utilities stemming from private investment in preregulatory periods or to those initiated by private enterprise without contribution of necessarily vital power by government conditioned upon compliance with the terms of the grant. * * *"

Of greater importance, the issue, as presented in the *Alabama* and *Louisville* cases, involved only a threatened general conflict between the federal and state regulatory authorities and did not involve such an assumption of jurisdiction over corporate affairs as would oust and deny all judicial authority and all state authority and adjudicate specific rights.

The Commission's order goes beyond the scope and function of accounting.

The court below apparently relies solely on the decision of this Court in *Kansas City Southern Railway v. United States*, 231 U. S. 423, 455, to authorize the Commission's order. But that decision considered only a requirement that costs arising out of the *abandonment* of property which had become a non-existent asset in the current year be charged to operating expenses rather than capitalized, which was consonant with generally accepted practice. This required charge to operating expenses was merely a step in determining net income, clearly a matter in which accounting has a legitimate function. The Interstate Commerce Commission did not, however, attempt to make any determination or impose

any requirement with respect to the *disposition* or *use* of net income. In this case, the Commission's order does not concern itself with the *determination* of net income. The Commission assumes jurisdiction to direct the disposition or use of a part of Northwestern's net income after the amount of such income has been determined, annually, by that company. This is not a function of accounting.* And this Court did not hold that the Kansas City company could be required to charge *any disputed item* to earnings, regardless of the legal rights of the persons affected.

The *Kansas City* case, in so far as it deals with current accounting and the determination of income through charges to operating expenses, approves what may reasonably be considered the exercise of a legislative power within the distinction noted in *Crowell* v. *Benson*,** 285 U. S. 22, 49, 57, and *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210.

The decision of the court below recognizes "that the statute [Sec. 301(a)] is not so broad as it seems on a first reading of it." And certainly the provisions of this section

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* Robert H. Montgomery, Auditing Theory and Practice, Vol. I, p. 333

** In *Crowell* v. *Benson*, this Court cites with approval the following quotation from the case of *Den* v. *Hoboken Land and Improvement Co.*, 18 How. 272, 284:

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

And states, at page 57:

"* * * The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

which purport to authorize the Commission to "determine by order the accounts in which particular outlays and receipts shall be entered, charged or credited," are not to be so construed as to make definitions and regulations issued in connection therewith determinative of legal rights regardless of consequences. Otherwise, the statutes of a state, and the decisions of its highest court interpreting the law of such a state, cannot be determinative and afford no assurance as to any contractual right or liability; all legal and equitable rules may be disregarded (in effect, discarded) and all past transactions, however remote, become subject to review and adjustment in accordance with what the Commission, in its own unfettered discretion, may consider desirable for the purposes of its future regulation. And "the security inherent in our judicial safeguards" may well be seriously impaired. *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 52.

Application of accounting concepts should not be permitted to destroy substantive rights.

The power to impose a system of accounts and to authorize its intended employment and purposes sanctions only a prospective operation. But, even aside from constitutional limitations, the broad general language of such a statute should not be construed as authorizing affirmative action which interferes with antecedent rights unless such be "the unequivocal and inflexible import of the terms and the manifest intention of the legislature." *Union Pacific Railroad Co.* v. *Laramie Stockyards Co.*, 231 U. S. 190; *Union Pacific Railroad Co.* v. *Snow*, 231 U. S. 204, 213.

Consideration of the history of the Act and of the provisions of its other sections makes certain that the Commission was not intended to have an exclusive control over the affairs of public utilities or to impose a system of accounts to serve any such purpose. The Circuit Court of Appeals' general approval of the system on the first review

did not amount to a finding that the system was not "unwise or burdensome or inferior to another," but merely that it was not "so entirely at odds with fundamental principles of correct accounting * * * as to be the expression of a whim rather than an exercise of judgment." *American Telephone & Telegraph Co.* v. *United States*, 299 U. S. 232, 237. Cf. *Butler Brothers* v. *McColgan*, 315 U. S. 501. Substantially all of the revenues of Northwestern are returned under intrastate rates which are not subject to the jurisdiction of the Commission, which also loses its jurisdiction over the issuance of securities if, as is the case here, the public utility is "organized and operating in a State under the laws of which its security issues are regulated by a State Commission" (Section 204(f) of the Act). And superior and over-riding jurisdiction is conferred upon the Securities and Exchange Commission with respect to many other subjects and requirements (Section 318 of the Act). Indeed, the Securities and Exchange Commission, acting under Section 15 of the Public Utility Holding Company Act, may exclude the Federal Power Commission from any exercise of jurisdiction over Northwestern's accounts.

The generation and distribution of electrical energy are primarily matters of local situs and concern. *Utah Power & Light Company* v. *Pfost*, 286 U. S. 165; *Public Utilities Commission* v. *Landon*, 249 U. S. 236. The Interstate Commerce Act vests in the Interstate Commerce Commission "a single administrative initiative and primary control" over the transportation systems of the country. *Procter & Gamble Company* v. *United States*, 225 U. S. 282, 296. In contrast, the state regulatory authorities alone have that comprehensive supervision over electric public utility companies which enables the direction of a harmonious development of such companies in the light of duties imposed upon them in the public interest.

The concepts of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 78, which overruled the confusion of *Swift* v. *Tyson* and held that there is no separate federal common

law, impel a denial of the broad interpretation of Section 301(a) which was adopted by the court below. Questions of substantive law should be determined in accordance with state law except in matters clearly governed by the Federal Constitution and the federal public interest.

Certainly, the Congress did not intend that substantive rights should be destroyed by the dogmatic application of the Commission's arbitrary "original cost" rules. In any event, accounting is a servant, not a master. It "has not yet been, and may never be, developed to a point at which it can deal effectively with more than a few interpretative and qualitative aspects of business data." *Paton and Littleton, "An Introduction to Corporate Accounting Standards"* (1940), page 11.

Implicit in the Commission's opinion and order is the assumption that the book values of Northwestern, as adjusted by the Commission under its system of accounts, are less than its liabilities. That the Commission does not seek the relation of actual costs to book values, however, is shown by its exclusion of "interest during construction," admittedly a cost incurred and a component of plant cost under the system of accounts (R. 46-50). Of greater importance is the effect of the requirement that existing values be written off upon the basis of the Commission's accounting costs without recognition of the fact that, with the passing of time, recorded dollar costs lose their original significance as an expression of committed purchasing power. The statement of costs in Northwestern's accounts, as adjusted by the Commission, does not reflect costs in terms of the current dollar. Accounting, for reasons of practical necessity, employs the dollar as a unit of computation in its attempt to interpret financial transactions in terms of the common medium of exchange, but assuming a static dollar. This commingling of ancient costs which were stated in terms of a dollar of greater purchasing power with costs stated in terms of the present dollar, is, in a sense, similar to the commingling of rubles and dollars without translation into

a common denominator. The statement of this fundamental concept is not an impeachment of accounting; it is only recognition of practical limitations and arbitrary assumptions inherent in its rules and conventions.*

Accounting's employment of the dollar as a convenient and expedient common denominator and its assumption that the measuring unit remains stable are matters of common knowledge. It is equally true that the changes in price levels and in the purchasing power of the dollar which have occurred in the recent past are matters of general and common knowledge. *Hope Natural Gas Company v. Federal Power Commission*, C. C. A. 4th, 134 F. (2d) 287. The determinations of the Commission, resting upon the assumption of a static dollar, do not reflect the true relation of either the actual cost or the present value of Northwestern's assets to its outstanding liabilities. The apparent arithmetical perfection of accounting is not real and if applied without recognition of its limitations may result, and here has resulted, in the violation of constitutional guarantees.

*"The assumption that recorded dollar cost continues to represent actual cost permeates accounting thought and practice, as it does the law. Accounting, in other words, assumes a stable measuring unit. In periods of major price movements this assumption is clearly invalid for certain purposes, as has been pointed out by various writers in recent years. Undoubtedly interpretative accounting faces a challenge at this point." (Paton and Littleton, An Introduction to Corporate Accounting Standards, p. 23.)

"The yardstick employed in accounting, unfortunately, is not a stable unit; the economic significance of the dollar, expressed in terms of the general price level, is a continuously changing amount. This means that recorded dollar cost is subject to possible misinterpretation as a measure of cost in the sense of committed purchasing power. It also means that under certain conditions the income or loss reported by conventional accounting procedure may not reflect the true change in economic status." (Idem, p. 139.)

II

The order of disposition is invalid because of its disregard of existing values, particularly (a) where the order is substantially equivalent to a judgment against the present owner of Northwestern's common stock upon an unpaid stock subscription of a predecessor owner—a judicial question to be determined only by the courts and law of the State of Washington, (b) where the rights of the present owner in the stock as settled by Northwestern's reorganization in 1936 and by the judgment of a state court of competent jurisdiction, and the status of the stock as fully paid, are determinable only by the law of the State of Washington, (c) where the method of write-off ordered is, in effect, a corporate reorganization of Northwestern and (d) where the Commission's allowance of preferred stock dividend payments tacitly recognizes that the capital structure is not impaired.

The Circuit Court recognized that the market value of the common stock would be impaired by the Commission's order. The charges and credits ordered by the Commission and affirmed by the Circuit Court will have the effect of requiring American, after purchasing all of Northwestern's common stock on the open market and in arm's-length transactions for $5,021,799.33, to pay an additional $3,500,000 therefor, although American, as an innocent purchaser for value of such common stock, holds it as fully paid. *Davies* v. *Ball*, 64 Wash. 292, 116 Pac. 833; *McCandless* v. *Furland*, 296 U. S. 140, 161; *Dickerman* v. *Northern Trust Co.*, 176 U. S. 181, 202-203.

A determination of whether Northwestern is required to recognize its common stock as fully paid is judicial in character, and in overriding the determination previously made by a Washington court of competent jurisdiction the Commission has arrogated judicial powers. Northwestern is a Washington corporation and the courts of

that state alone have authority to determine the adequacy of the consideration received upon the issuance of capital stock of corporations organized under its laws or to enforce payment of an allegedly unpaid stock subscription.

Rogers v. *Guaranty Trust Co. of N. Y.*, 288 U. S. 123;
Cohn v. *Mishkoff Costello Co.*, 256 N. Y. 102;
Beasley v. *Mutual Housing Co. Inc.*, 39 F. (2d) 290 (Ct. App. Dist. Col.);
Wallace v. *Motor Products Corp.*, 25 F. (2d) 655 (C. C. A. 6th).

The unauthorized character of this usurpation is emphasized by examination of the conflict which would arise in a converse situation. If the Commission is authorized to make such determinations without consideration of the law of the state of incorporation or the judgments and decrees of its courts, it follows that the decree of a state court cancelling stock which in its opinion had not been paid for could likewise be ignored by the Commission if the Commission's system of accounts may be administered without regard to the laws of the several states or to rights and obligations existing thereunder.

The restatement of the Company's accounts in 1936 which was one of the bases of the decree of the Superior Court of Washington in and for Clark County (Ex. 89, R. 1044-1052) and which was approved by the regulatory authorities of both Washington and Oregon (Exs. 63 and 64, R. 575-587) effected at least a quasi-reorganization of Northwestern. It involved a reduction of the aggregate par value of the common stock from $10,000,000 to $3,500,000 and the reissue of 100,000 shares of common stock with a par value of $35 per share, as fully-paid and non-assessable (Exs. 82-84; R. 869-895, 1053-1054). This restatement of Northwestern's capital structure was based upon a determination of its Board of Directors that the fair value of the assets of the corporation would be not

less than an amount equal to its restated liabilities, including surplus and reserve accounts (R. 888-889). The present fair value of public utility property is and has been the basis of regulation in both Washington and Oregon. *Pacific Telephone & Telegraph Co.* v. *Wallace*, 158 Ore. 210, 75 Pac. (2d) 942, at page 950; *State* v. *Department of Public Works of Washington*, 184 Wash. 451, 51 Pac. (2d) 610. Furthermore, Sections 23, 205 and 208 of the Federal Power Act itself (16 U. S. C. A. §§ 816, 824d and 824g) recognize the fair value principle both expressly and by implication.

The court below held that value upon any basis was irrelevant to the issues of this proceeding, although it clearly appears that the Commission's order attempts to effect at least a quasi-reorganization of Northwestern. In all reorganization cases, value is a fundamental standard which is required to be applied.

> *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, and cases there cited;
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> *National Surety Co.* v. *Cornell*, 289 U. S. 426, 436;
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> *Finletter*, The Law of Bankruptcy Reorganization (1939) 557-560;
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> *Craven and Fuller*, The 1935 Amendments of the Railroad Bankruptcy Law, 49 Harvard Law Review, 1254, 1272-1274;
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> *Bondbright*, Valuation of Property (1937) 884-893;
>
> *Dewing*, The Financial Policy of Corporations (1941), Vol. II, pages 1373-1376;
>
> *In the Matter of Utilities Power & Light Corp.*, 5 SEC 483, 500-501.

The essentially arbitrary and unfair character of the Commission's retroactive judgment of the rights and obligations of petitioners in this case is made apparent by the record. For example, the petitioners offered to prove (R. 922) that "the enhancement in the structural value as of December 31, 1924 [approximately the date

as of which American acquired the common stock of Northwestern] over the structural value of such property as of the respective dates at which such property was first placed in operation was not less than $3,250,000, giving full consideration to the depreciation which may have accrued on such property as of December 31, 1924." Thus, substantially all of the "excess" here under consideration was represented by such enhanced structural value and, if American's investment in the property of Northwestern through its purchase of the common stock of that company is to be treated realistically, should be disposed of over the life of Northwestern's property and out of operating revenues and thus paid by the rate-payer rather than out of net income at the expense of the stockholder, as is sought to be accomplished by the Commission's order. (See in this connection the testimony of Charles W. Smith, the Commission's principal witness, R. 393-395.)

The Commission's identification of $3,500,000 as a "write-up" was made without giving any consideration whatever to values fully supporting the common stock at the time of American's acquisition and at the time of the hearing.

> "* * * The identification of 'write-ups' in approximately this amount does not create, however, a supposition that the restatements of book cost were illegitimate, improper, or unreasonable at the time when made. In fact, the past recognition of appreciated values for accounting purposes is implied by the decision of the Supreme Court of New Jersey in Passaic Consol. Water Co. v. Public Utility Comrs. (1927) 5 N. J. Misc. R. 1078, P.U.R. 1928 B, 242, 139 Atl. 324 (aff. [1928] 104 N. J. L. 666, 141 Atl. 921), to the effect that in 1925 a utility had the right to record on its books 'the full value of its property' * * *."
>
> *Re Jersey Central Power & Light Company*, 33 P. U. R. (N. S.) 207, 212.

The reclassification of Northwestern's accounts pursuant to the Commission's special system of accounts and the resulting inclusion of $3,500,000 in Account 107, Electric Plant Adjustments, by no means involves an appropriate determination that the surplus recorded on Northwestern's books is either non-existent or in any way impaired. *Randall v. Bailey et al.*, 288 N. Y. 280. As Mr. Justice Brandeis said, speaking for this Court, in *Edwards v. Douglas*, 269 U. S. 204, at page 214:

> "The word 'surplus' is a term commonly employed in corporate finance and accounting to designate an account on corporate books. * * * The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be 'paid-in surplus,' as where the stock is issued at a price above par. It may be 'earned surplus,' as where it was derived wholly from undistributed profits. Or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property. See *La Belle Iron Works v. United States*, 256 U. S. 377, 385."

Significant also in this connection is *Passaic Consolidated Water Company v. Board of Public Utility Commissioners*, 139 Atl. 324; aff'd 141 Atl. 921, in which the Supreme Court of New Jersey held that a utility had the right to record on its books "the full value of its property" and by clear implication approved the prior recognition of appreciated values for accounting purposes.

See also:

People ex rel. Iroquois Gas Corp. v. Pub. Serv. Comm. of State of N. Y., 264 N. Y. 17, 189 N. E. 764;

Matter of New York Edison Co. v. Maltbie, 244 App. Div. 685, affirmed 271 N. Y. 103;

Matter of Lockport Light, Heat & Power Co. v. Maltbie, 257 App. Div. 11.

The effect of the Commission's order is to require the contribution of an additional $3,500,000 to the capital of Northwestern. As the Commission's opinion states, "This disposition, assuming adequate earnings, is the equivalent of obtaining ultimately from the holders of the common stock (the holding company) a consideration of $3,500,000 for the stock." (R. 69) This requirement is not predicated upon any judgment or finding, either on the basis of the Commission's accounting concepts or on any other basis, that the capital of Northwestern is impaired. The Commission finds (R. 72) that the $3,500,000 "should be disposed of by applying thereto all annual net income, after allowance for Preferred Stock dividend requirements, until the disposition of the entire amount has been accomplished." However, its order clearly recognizes the propriety of paying, and permits the payment of, preferred stock dividends (R. 78). The Commission could not have believed that the capital of Northwestern was impaired or it would have recognized the basic rule of accounting that, in such circumstances, no dividends, either preferred or common, could be paid.

III

Even if the order were not otherwise invalid, the method of write-off ordered by the Commission is unsupported by substantial evidence and the order is arbitrary in requiring the write-off to be made entirely out of future earnings.

The Commission's order requires that $3,500,000 be written off entirely out of future earnings. If the order were otherwise valid, that provision which prevents the application of Northwestern's existing surplus of more than $1,000,000 (Ex. 81, R. 869) to such write-off is arbitrary and without relation to any valid distinction between future earnings for common stock and earnings which accumulated prior to the date of the Commission's order.

The attempted distinction is not supported by any evidence or by any principle of accounting, has not been made in any other order of the Commission entered in similar cases and is unexplained except by the statement that such a course may be directed for policy reasons. This is a patent and unwarranted invasion of the prerogatives of management, which should at least be left free to determine for itself whether, if such a write-off be required, existing earned surplus should be applied thereto. The order in this respect is not excused by the statement that Northwestern was afforded opportunity to present a specific plan of disposition, and chose instead to maintain its right to retain the disputed amount in its accounts. A failure on the part of the Company to suggest a different plan does not authorize such an arbitrary and invalid requirement.

IV

Even if the order were not otherwise invalid, the method of write-off ordered by the Commission is invalid in that it involves an unlawful assumption by the Commission of jurisdiction over the payment of dividends by Northwestern and over a corporate reorganization of Northwestern.

Section 318 of the Act provides:

> "If, with respect to the * * * disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange

Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person."

Northwestern, as a subsidiary of American, a registered holding company, is subject to the provisions of the Public Utility Holding Company Act of 1935. Section 11 of that Act contains a grant of powers to the Securities and Exchange Commission with respect to reorganizations, and Section 12(c) vests in the Securities and Exchange Commission jurisdiction over the payment of dividends by subsidiaries of registered holding companies. That Commission has not exempted Northwestern from any requirement of the Public Utility Holding Company Act, and consequently Section 318 of the Federal Power Act excludes the Federal Power Commission from the exercise of any jurisdiction over a reorganization of Northwestern or over the payment of dividends by Northwestern.

V

The Circuit Court of Appeals deprived these petitioners of their right to judicial review, provided for by Section 313(b) of the Federal Power Act, and guaranteed by the due process clause of Article V of the Amendments to the Constitution of the United States.

(a) The court refused to consider whether the Commission was authorized to order a write-off of $3,500,000 of book values in excess of original cost without consideration of proof of existing values offered by petitioners on rehearing before the Commission while the first review was still pending, on the ground that this question had been decided on the first review, when the court approved the system of ac-

counts prescribed and held that questions of value were not pertinent to the issues of reclassification (R. 806, 816-817).

The question of disposition of the $3,500,000 was not in issue on the first review, unless it must be held that upon reclassification of an item in Account 107 the disposition of such item in any manner which the Commission may elect follows as an automatic consequence. But disposition or employment of net income, following the determination of such income as an accounting function, is never automatic. American was not a party to the first proceeding. Proof of American's acquisition of Northwestern's common stock at arm's length and for value, of the quasi-reorganization of Northwestern in 1936, and of the value of the property of Northwestern (i) at the time of American's acquisition, (ii) at the time of the quasi-reorganization, and (iii) at the time of hearing, which was submitted or offered on behalf of both petitioners in the second hearing, was not before the court on the first review. And the values so offered to be proved fully supported Northwestern's capital structure; among other things, in the year ended May 31, 1940, Northwestern earned more than $220,000, or more than 6%, on its outstanding common stock (R. 25). That this issue was not then considered by the court below is made certain by the concluding statement in its first decision: "With respect to the common-stock item, a rehearing of the Commission's order was granted but not decided. Until decided there is no 'order' to review here." That decision contains no discussion of either the reclassification or disposition of "the common-stock item." Thus, the court below disregarded the issue on the first review, but regarded it as previously decided when it was raised on the second review.

(b) The court refused to consider whether the Commission had arrogated judicial powers by deter-

mining, in effect, that the common stock of Northwestern was not legally paid up—a question properly determinable only by the courts and under the law of Washington—basing such refusal solely on the mistaken premise that petitioners had not contended the statute was void.

The petitioners have not contended in this proceeding that the statute is void. They did contend, however, before the Commission and before the court below, that the Act does not empower the Commission to enter such an order of disposition, that the order would take the property of these petitioners without due process of law and in violation of Article III of and both the Fifth and Tenth Articles of the Amendments to the Constitution of the United States and, therefore, that the order was without authority of law. The question as to whether, in order to avoid the conclusion of unconstitutionality, the statute should be construed to deny the power to enter the order of disposition, was clearly presented. Where determination of the question is necessary, the court below was bound, if fairly possible, to construe the law so as to avoid the conclusion of unconstitutionality. *Porter* v. *Investors Syndicate*, 286 U. S. 461. If a statute is reasonably susceptible of two interpretations, one of which would render it unconstitutional, and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity. *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531.

The court, mistaking the issues, has denied these petitioners an opportunity to be heard and their day in court with respect to each of the foregoing questions. *Lutcher & Moore Lumber Company et al.* v. *William H. Knight et al.*, 217 U. S. 257; *A. M. Anderson, Receiver,* v. *Atherton*, 302 U. S. 643; *Guaranty Trust Co. of New York* v. *United States*, 304 U. S. 126.

It is respectfully submitted that the foregoing petition for writ of certiorari should be granted.

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APPENDIX A

Excerpts from Federal Power Act (16 U. S. C. A. §§ 791 *et seq.*)

"SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

"(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

* * *

"SEC. 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate making purposes, other facts which

bear on the determination of such cost or depreciation, and the fair value of such property.

"(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

* * *

"SECTION 301. (a) Every licensee and public utility shall make, keep, and preserve for such periods, such accounts, records of cost-accounting procedures, correspondence, memoranda, papers, books, and other records as the Commission may by rules and regulations prescribe as necessary or appropriate for purposes of the administration of this Act, including accounts, records, and memoranda of the generation, transmission, distribution, delivery, or sale of electric energy, the furnishing of services or facilities in connection therewith, and receipts and expenditures with respect to any of the foregoing: *Provided, however*, That nothing in this Act shall relieve any public utility from keeping any accounts, memoranda, or records which such public utility may be required to keep by or under authority of the laws of any State. The Commission may prescribe a system of accounts to be kept by licensees and public utilities and may classify such licensees and public utilities and prescribe a system of accounts for each class. The Commission, after notice and opportunity for hearing, may determine by order the accounts in which particular outlays and receipts shall be entered, charged, or credited. The burden of proof to justify every accounting entry questioned by the Commission shall be on the person making, authorizing, or requiring such entry, and the Commission may suspend a charge or credit pending submission of satisfactory proof in support thereof.

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"SEC. 318. If, with respect to the issue, sale or guaranty of a security, or assumption of obligation or lia-

bility in respect of a security, the method of keeping accounts, the filing of reports, or the acquisition or disposition of any security, capital assets, facilities, or any other subject matter, any person is subject both to a requirement of the Public Utility Holding Company Act of 1935 or of a rule, regulation, or order thereunder and to a requirement of this Act or of a rule, regulation, or order thereunder, the requirement of the Public Utility Holding Company Act of 1935 shall apply to such person, and such person shall not be subject to the requirement of this Act, or of any rule, regulation, or order thereunder, with respect to the same subject matter, unless the Securities and Exchange Commission has exempted such person from such requirement of the Public Utility Holding Company Act of 1935, in which case the requirements of this Act shall apply to such person."